IN THE

# Supreme Court of the United States

October Term, 1949

No. 25

ELMER W. HENDERSON,
*Appellant*

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
SOUTHERN RAILWAY COMPANY,
*Appellees*

On Appeal from the United States District Court for the District of Maryland

## MOTION FOR LEAVE TO FILE BRIEF
and
## BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS *AMICUS CURIAE*

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Congress of Industrial Organizations respectfully moves this Court for leave to file the annexed brief *amicus curiae*. The appellant, and two af the appellees, the United States and the Interstate Commerce Commission, have consented to the filing of this brief; the remaining appellee, the Southern Railway Company, has refused its consent.

The preamble to the Constitution of the Congress of Industrial Organizations provides:

> "Democracy stems entirely from free choice. Diligently practiced, it is the only logical human formula for the attainment of economic and political independence; for the realization of a just and equitable return on one's labor; for guarantees of full employment, of social security, and of the protection of the family as an institution. . . .
>
> "The struggle for human freedom is a continuous one. The task of those who would bring security and greater understanding to mankind throughout the world is endless. It is in this all-consuming struggle, however, that men and organizations make their contributions to a better life. Therefore, we in the CIO glory in our heritage and in the hope of our future. Racial prosecution, intolerance, selfishness, and greed have no place in the human family. We will not be satisfied until ours is a world of free men and women and of happy children. It is to these ends that this Constitution of the CIO is dedicated.

> It is the charter of our lives; through it we seek to maintain and extend liberty and opportunity here and throughout the world."

As an organization so dedicated, the CIO has a real and genuine interest in the elimination of discrimination based on color from every phase of American life. It has, therefore, an interest in the present litigation, in which the validity of governmentally sponsored racial discrimination is called into question.

In addition to this general interest in the elimination of discrimination, the CIO has a particular practical interest in the outcome of this litigation. Governmental action requiring racial segregation is not only offensive to the principles for which this organization stands. It also has a direct effect on this organization's activities. The CIO, through its constituent organizations, is endeavoring to practice non-segregation and non-discrimination in the every day functioning of labor union affairs. Repeatedly, in the past, this endeavor has been obstructed by statutes, ordinances, and regulations which require segregation in public dining places, public meeting halls, toilet facilities, etc. Thus, in some states CIO unions are required to maintain "separate but equal" facilities in their own semi-public buildings, despite the avowed desire of the membership to avoid segregation in any form.

These requirements, whether in the form of regulations, statutes or ordinances, rest constitutionally on a line of reasoning and authority identical with that relied on by the court below in the present case. The disposition which this court makes of the case is, therefore, of real and direct interest to the Congress of Industrial Organizations in the regulation of its activities.

Accordingly, the Congress of Industrial Organizations moves this Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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## BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS *AMICUS CURIAE*

1. That the dining car regulations of the Southern Railway, sanctioned and approved by the Interstate Commerce Commission, are discriminatory has, we think, been amply demonstrated by the appellant, by the United States and by other *amici curiae*. We will not, therefore, labor that point in this brief. We should like, however, to emphasize one aspect of the matter which is of particular importance to the Congress of Industrial Organizations.

A regulation setting aside separate places for Negro diners, like a regulation requiring separate eating places, toilet facilities, etc., does more than discriminate against Negroes. It also has the effect of enforcing segregation practices on those, Negro and white alike, to whom such practices are abhorrent.

This has been the experience of the Congress of Industrial Organizations. In Memphis, for example, the CIO owns and operates a public meeting place for the use of its members. The CIO is opposed to segregation. But the CIO violates a Memphis ordinance if, in accordance with the overwhelming

preference of its membership, it fails to provide segregated facilities in its own building.

Similarly, in the present case, Negro and white are forbidden to dine together on the cars of the Southern Railway. The present regulation does not merely have the effect of permitting those Negroes or whites who prefer not to sit with members of the other race to exercise that preference. There is no question of preference or choice. To the contrary, the wishes of the particular diners are ignored. They must practice segregation whether they wish to or not.

It is not merely a matter of a governmental body offering separate facilities to members of different races, as in the education cases. As we have elsewhere stated,[1] we believe that such practices are unconstitutional. But the present regulation does more. It requires individuals who travel on the same train to themselves practice discrimination and segregation when they enter the railroad's dining car. The present regulation does not merely permit individuals to avoid sitting with members of different races. On the contrary, it forbids them to sit together, irrespective of their own personal preferences.

The evil in the dining car regulations is thus not only that a Negro may be refused a seat at a time when seats are available to whites, and, similarly, that a white may be refused a seat when seats are available to Negroes. The evil is also that the regulations decree that those who patronize the diner must divide themselves, on a line based on color, before they may be seated, whether they wish to do so or not. That evil would exist even if the railroad provided unlimited diner facilities so that no person would ever be denied a seat because of his color. Even were such facilities available, both Negro and white would be subjected "to undue and unreasonable prejudice and disadvantage" by being forbidden to sit, when they so desired, with members of the other race.

2. This aspect of the dining car regulations here involved is of the greatest importance. This case cannot properly be

[1] See Brief for Congress of Industrial Organizations as amicus curiae in *Sweatt* v. *Painter*, No. 44, October Term, 1949.

decided on the sole ground that the regulations, as they now stand, may deny seats to individual patrons because of their color. It cannot properly be so decided because this Court has an obligation to the parties, and in particular to the Interstate Commerce Commission, to give some indication as to the proper basis on which an acceptable regulation may be drawn.

It will be remembered that the Southern Railway's initial dining car regulation provided for segregated tables but permitted the use of the Negro tables by whites when the white section of the car was full. The Negro tables were thus only "conditionally reserved," while the white tables were absolutely reserved.

The District Court found this regulation to be invalid. The Commission then approved a new regulation which met the narrow objection of the District Court by making the reservation of the Negro table for Negroes absolute rather than conditional. This revised regulation is now under attack. It too can be held invalid on a narrow ground because, under it, a Negro may be denied a seat when the Negro table is occupied but a white table is empty and, similarly, a white may be denied a seat when the white tables are occupied but the Negro table is vacant. This was the narrow ground on which Judge Soper dissented below.

The difficulty with such a holding is that again the Commission, on remand, may change the regulations to meet this objection, without disturbing the basic evil involved in enforced segregation. Reverting to its earlier practice of conditional reservations, the railroad will be able to provide that both Negro and white tables be conditionally reserved, so that the overflow from one section can be taken care of in the other whenever tables are available in the other.

Such a regulation would, we submit, also be invalid if it maintained the present prohibition against the joint seating of Negroes and whites when the individuals concerned desired it. The Court has no obligation, of course, to pass upon the validity of a hypothetical regulation. But it does have an obligation to pass upon the present regulation in a straight-

forward manner so that the Commission, and the Courts below, can know whether the Federal government, through the Interstate Commission, may force upon the patrons of dining cars an involuntary separation based on race. That issue is directly presented in the present case and, we submit, it should be decided so as to avoid further fruitless litigation.

3. The segregation issue arises in this case under the provisions of the Interstate Commerce Act providing that it shall be unlawful "to subject any particular person . . . to any unreasonable prejudice or disadvantage in any respect whatsoever." The briefs of the appellant and of the United States demonstrate, without question, we believe, that the dining car regulations transgress this statutory command. In our view, however, decision cannot be made on this point without reference to the provisions of the 14th Amendment.

The command of the Interstate Commerce Act that no railroad shall "subject any particular person . . . to any undue or unreasonable prejudice or disadvantage" is a broad one, "Not only was the evil of discrimination the principal thing aimed at, but there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." *Mitchell* v. *United States*, 313 U. S. 80, 94.

But the command of the statute is no broader than the command of the 14th Amendment that no state shall deny to any person the equal protection of its laws. Indeed in the *Mitchell* case, this court, in dealing with the discriminatory practices of a carrier, approached the statutory problem only *via* the 14th Amendment. Faced with the issue as to whether a railroad regulation discriminating against Negroes was in violation of the statute, the Court first decided (313 U. S. at 94) that the regulation, if enforced by a state, would be a violation of the 14th Amendment, citing *McCabe* v. *Atchison, T. & S. F. Railway Co.*, 235 U. S. 151 and *Missouri* ex rel. *Gaines* v. *Canada*, 305 U. S. 337. This was the Court's first premise. The second premise was that the requirements of the statute were as broad as those of the 14th Amendment. The Court

concluded, therefore, that the regulation was in contravention of the statute.

In the present case, similarly, the statutory standard cannot be dealt with apart from the precedents which this Court has established in dealing with state regulation under the 14th Amendment. The commandments of the statute and the Amendment are the same. The Amendment is addressed to the states and commands them not to deny to any person the equal protection of the laws. The statute is addressed to the railroads (and the Commission) and directs them not to deny to any particular person the equal protection of their regulations. The substance of both commands is the same.

It is for this reason that we believe that this case cannot be decided without reference to *Plessy* v. *Ferguson*, 163 U. S. 537, and should not be decided without expressly reversing the rule of that case. The Court, in *Plessy* v. *Ferguson*, held that a state statute requiring racial separation in public carriers was not in violation of the 14th Amendment. In this case, the Court has before it a regulation of the Interstate Commerce Commission requiring racial separation in dining cars. The question before the Court is whether this regulation violates a Federal statutory command identical in content with the 14th Amendment. That question, we submit, cannot be decided without reference to the *Plessy* case.

4. The background and the subsequent history of the *Plessy* case have been thoroughly explored in the briefs already presented to the court. We should like to emphasize here, as we have done above, the compulsory nature of the segregation involved in both the *Plessy* case and the present case. In the *Plessy* case, the Court ignored the very important distinction between a provision of law *permitting* individuals to separate themselves according to race and a provision *requiring* them so to separate. Obviously the two are different. The first permits individuals to exercise their own freedom of choice, to respond in whatever way their prejudices or lack of prejudices may impel them. The second, on the contrary, permits no choice. Prejudice is imposed by the constituted authority without regard to the preferences of individuals.

Yet the Court, in the *Plessy* case, treated the two together and seemed to have assumed that they were the same. In so doing, we submit, it announced a doctrine which is erroneous and which should no longer be permitted to stand. Thus the Court said that "we cannot say that a law which authorizes or even requires the separation of the two races in public conveyance" is violative of the 14th Amendment. 163 U. S. at 550. And the argument against the statute, the Court said, "assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races." 163 U. S. at 551. The argument, of course, need make no such assumption. The alternatives are not enforced segregation or enforced commingling.[1] Nor is the question whether a law may constitutionally *permit* the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a state, or the Interstate Commerce Commission, may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

The Court could confuse the issue, as it did in the *Plessy* case, only because it implicitly assumed throughout the opinion that the Negro race was "inferior"[2] and that, given freedom of choice, all whites would refuse to associate with Negroes. On that assumption, and only on that assumption, the only alternatives were segregation and compulsory intermingling, and permissive separation was the same thing as compulsory separation.

The assumption is false. The Congress of Industrial Organizations is living proof that it is false. And, apart from matters of proof, certainly such an assumption, embodying itself the very prejudices at which the 14th Amendment was aimed, has no place in our constitutional doctrine.

The time has come, we believe, for the Court to disavow

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[1] These alternatives could possibly be argued to be exclusive only in cases involving compulsory public education, where there is usually no choice as to attendance and seating arrangements.

[2] "If one race be inferior to the other socially," the Court said, "the Constitution of the United States cannot put them upon the same plane." 163 U. S. at 551.

that assumption and the constitutional doctrine which rests upon it. The dining car regulations now before the Court squarely present the basic question: whether a command, either statutory or constitutional, outlawing all discrimination based on race, is violated by a statute or a rule which positively imposes upon the community the practice of racial segregation. The erroneous answer to that question given in *Plessy* v. *Ferguson* should here be reversed and the odious doctrine of that case explicitly expunged.

Respectfully submitted,

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